[illegible]

[illegible] N.A., *et al.*,

*Petitioners,*

v.

[illegible] Life Insurance Company, *et al.*,

*Respondents.*

[illegible] Comptroller Of The Currency, *et al.*,

*Petitioners,*

v.

[illegible] Life Insurance Company, *et al.*,

*Respondent.*

[illegible]

[illegible] Court Of Appeals

[illegible]

BRIEF OF RESPONDENT

[illegible] STEWART

[illegible]

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## QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the *Chevron* standard when it did not adopt the Comptroller's new construction of 12 U.S.C. § 24(7) or his new determination that annuities do not constitute "insurance" for purposes of 12 U.S.C. § 92, even though the Comptroller contradicted his prior construction of those statutes. (No. 93-1612)

2. Whether 12 U.S.C. § 92, which provides that, "in addition to" their other powers, national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company," impliedly bars national banks in more populous places from brokering annuities. (No. 93-1612)

3. Whether federal law permits national banks, wherever located, to act as agents in the sale of annuities. (No. 93-1613)

4. Whether the sale of annuity contracts is "necessary to carry on the business of banking" under 12 U.S.C. § 24(7).

## DISCLOSURE OF CORPORATE PARENT

American General Corporation is the parent corporation of respondent, Variable Annuity Life Insurance Company.

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Nos. 93-1612, 93-1613

IN THE
# Supreme Court of the United States

October Term, 1994

NationsBank Of North Carolina, N.A., *et al.*,
*Petitioners,*

v.

Variable Annuity Life Insurance Company,
*Respondent.*

Eugene Ludwig, Comptroller Of The Currency, *et al.*,
*Petitioners,*

v.

Variable Annuity Life Insurance Company,
*Respondent.*

**On Writs Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

## BRIEF OF RESPONDENT

## COUNTER-STATEMENT OF THE CASE

This case concerns whether NationsBank, a national bank based in Charlotte, North Carolina, can sell annuity contracts through a subsidiary. R. 57-59.[1] As proposed by NationsBank, annuity purchasers could choose from a number of annuity options, in return for either a single or multiple premium. R. 13. Purchasers also could direct whether premiums are accumulated "solely in a variable account, solely in a fixed account or in a

[1] References to "R.___" herein are page references to the record on appeal to the court of appeals.

combination of variable and fixed accounts." *Id.* Purchasers could change this allocation prospectively and also "transfer all or a portion of the accumulated value of any annuity account to another annuity account." *Id.* Pay-out options would include the right to receive annuity payments "on a fixed or variable basis or partly on a fixed basis and partly on a variable basis." *Id.*

Annuities are a form of insurance that national banks in large towns cannot sell both because of the limitations imposed by 12 U.S.C. § 92, and because they have no authority to do so under 12 U.S.C. § 24(7).

### A. 1863: Congress Establishes National Banks With Limited Powers

Congress established the national banking system in 1863, and specifically defined national bank powers in Section 11 of that legislation. Act of Feb. 25, 1863, ch. 58, § 11. 12 Stat. 668. The following year, Congress amended Section 11, Act of June 3, 1864, ch. 106, § 8, 13 Stat. 99, 101. That statute, codified at 12 U.S.C. § 24 (Seventh) ("Section 24(7)"), provides that national banks have the power:

> [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . . .

Fifty years later, the Federal Reserve Board considered whether a national bank could act as an agent or broker in the sale of insurance. Noting that the power to sell insurance is not specified in the statute, the Board determined that "writing insurance on commission is in no sense incidental to any of the

enumerated powers of a national bank." 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916).

### B. 1916: Congress Grants Limited Authority To Small-Town National Banks To Act As Agent For Insurance Companies

The Comptroller of the Currency in 1916 agreed with the Federal Reserve Board that national banks have no power to sell insurance. 53 Cong. Rec. 11,001 (1916). To provide "small national banks" with additional revenue, Comptroller John Skelton Williams asked Congress to grant "limited" authority to national banks located in small "villages and towns" "to act as agents for insurance companies in the placing of policies of insurance." *Id.* He sought congressional action because "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." *Id.* Comptroller Williams observed that, under existing law, "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." *Id.*

Although he was wary of allowing banks "to trespass upon outside business naturally belonging to others," the Comptroller explained that the small amount of business generated at small town national banks would "not [be] likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.* Comptroller Williams pointedly advised Congress that "it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers." *Id.*

At the Comptroller's urging, Congress enacted 12 U.S.C. § 92 ("Section 92"), Act of Sept. 7, 1916, ch. 461, 39 Stat. 753, which provides that national banks:

> located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may . . . act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance . . . .

### C. 1968: The Fifth Circuit Blocks Insurance Agency Activity By National Banks In Larger Towns

*Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968), construed Section 92 to "prohibit national banks from carrying on the business of insurance agents in places of more than 5,000 population." Applying the principle of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), *Saxon* reasoned that by conferring limited insurance agency powers upon small-town national banks, Congress "clear[ly]" intended to deny "any other power" for national banks to act as insurance agents. *Id.* at 1014, 1016. Noting the legislative genesis of Section 92, *Saxon* further explained that prior to enactment of the law, it was "universally understood that no national banks possessed *any* power to act as insurance agents." *Id.* at 1013 (emphasis in original). *Saxon* therefore rejected the assertion that national banks could act as insurance agents under 12 U.S.C. § 24(7).

### D. 1978: The Comptroller Rules That Section 92 Bars The Sale Of Annuities By Large-Town National Banks

In an opinion letter dated June 16, 1978, the Comptroller ruled that a national bank's proposal to broker annuities as agent for an insurance company "would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. § 92." R. 7-8 (reproduced in Brief in Opp., at App. A). The Comptroller rejected the bank's attempt to evade Section 92 by characterizing its role as "fiduciary." The Comptroller observed that "in reality" "the bank is receiving [a fee] for the sale of insurance." *Id.*

A few years later, the Comptroller similarly ruled that Section 92 would prohibit a national bank from acting as agent in the sale of life insurance. OCC Interpretive Letter No. 241, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,405 (Mar. 26, 1982) ("OCC Ltr. 241"). The Comptroller explained (*id.* at 77,508):

> it is highly unlikely that a court would consider the activities of a national bank which acted as an agent in the sale of life insurance as incidental to banking under 12 U.S.C. § 24(7).

**E. 1990: The Comptroller Reverses Himself On The Sale Of Annuities By National Banks**

By letter dated March 21, 1990 (the "Approval"), the Comptroller approved NationsBank's proposal to sell annuities as agent for life insurance companies. The Approval conceded that "annuities have historically been a product of insurance companies" and that "annuities often share with insurance the need for actuarial calculations" of "mortality risk." NationsBank Pet. App. 38a-39a. To avoid the statutory limits on the insurance activities of national banks, the Comptroller renamed annuities, calling them "financial investment instruments." He then asserted that national banks have the inherent power to "broker a wide variety of financial investment instruments." *Id.* at 38a. The Comptroller added that fixed annuities are "similar to" variable annuities, which he previously had allowed national banks to broker. *Id.* at 39a; OCC Interpretive Letter No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,773-77 (Apr. 4, 1985) ("OCC Ltr. 331").

The Approval disagreed with *Saxon*'s holding that the limited "insurance agency power in Section 92 . . . negates the existence of any other power to act as an insurance agent." 399 F.2d at 1014; NationsBank Pet. App. 42a. The Approval also expressed "doubt[ ] that the word 'insurance' in Section 92 can

be construed to include annuities." *Id.* at 43a. The Approval never mentioned the Comptroller's 1978 conclusion that Section 92 bars national banks from selling annuities, except in small towns.

### F. 1992: The Second Circuit Holds That Section 92 Bars Large-Town National Banks From Selling Title Insurance

*American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993), construed Section 92 to prohibit national banks from selling title insurance, as agent, in towns with more than 5,000 inhabitants. Applying the *expressio unius* principle and examining the legislative genesis of Section 92, *American Land Title* agreed with *Saxon* that "had Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants." *Id.* at 155. The court held that the statutory phrase "*any* fire, life, or *other* insurance company" "makes inescapable the conclusion that Congress intended [Section 92] to apply to 'any . . . insurance company,'" including a title insurance company. *Id.* at 156 (emphasis in original).

### G. Proceedings In The Courts Below

After VALIC brought suit challenging the Approval, the district court denied VALIC's motion for summary judgment and granted petitioners' cross-motions for summary judgment. *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991) (NationsBank Pet. App. 29a-34a). The court of appeals reversed. *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994) (NationsBank Pet. App. 1a-28a).

Finding that the language and legislative genesis of Section 92 establish Congress' meaning, the court of appeals reaffirmed

*Saxon*'s holding that "under § 92 'national banks have no power to act as insurance agents in cities of over 5,000 population.'" NationsBank Pet. App. 6a, 10a. The court noted that when the intent of Congress is clear, deference to an administrative interpretation is not appropriate under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). NationsBank Pet. App. 9a (citing *Presley v. Etowah County Comm'r*, 112 S. Ct. 820 (1992)). The court also cited the 1992 ruling in *American Land Title Ass'n* that, as *Saxon* held (NationsBank Pet. App. 7a), "'had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants.'"

The court of appeals disagreed with the Comptroller's alternative contention that Section 92 does not apply because "annuities are not insurance." NationsBank Pet. App. 10a. The court observed that the Comptroller had conceded that "annuities have historically been a product of insurance companies" and that annuities are based on "actuarial calculations" of mortality risk. *Id.* at 10a, 13a n.4. The court reported that "[a]ll fifty states currently regulate annuities under their insurance laws." *Id.* at 11a. Since annuities transfer and distribute mortality risk, the court concluded that annuities are "insurance in the true sense of the term." *Id.* at 12a, n.3.

The court of appeals rejected the Comptroller's assertions that Section 92 does not limit the sale by national banks of "specialized" insurance products like annuities and that the selling of annuities is an "incidental power" granted to national banks under 12 U.S.C. § 24(7). Stressing Section 92's bar against large-town national banks serving as agents for "any . . . insurance company," the court refused to engage in the "arbitrary exercise of examining whether a particular type of insurance product conforms to a platonic form of 'general'

insurance." NationsBank Pet. App. 13a (quoting *American Land Title*, 968 F.2d at 156), 14a. The court of appeals also observed that the sale of annuities is not "necessary to carry on the business of banking" under Section 24(7), and even if it were necessary, the specific bar of Section 92 would control over that more general statute. *Id.* at 15a (citing *American Land Title*, 968 F.2d at 157).

The full court of appeals denied the petition for rehearing en banc, with four judges dissenting. NationsBank Pet. App. 19a. Six judges were recused, while one member of the panel was a senior judge and did not participate in the en banc process.

## SUMMARY OF ARGUMENT

National banks may exercise only those powers that have been granted by Congress. The Comptroller's Approval of national bank sales of annuities violates the limitations in Section 92 and exceeds the authority granted by Section 24(7) of the National Bank Act.

Enacted in 1916, Section 92 granted insurance agency powers solely to national banks in small towns. That limited grant of powers includes a denial of such powers to national banks in larger communities. As embodied in the *expressio unius* principle, the structure of Section 92 denies to national banks those insurance agency powers not affirmatively granted. This construction of the statute is powerfully supported by the contemporaneous statements of the Federal Reserve Board and the Comptroller of the Currency, both of which concluded that national banks have no other insurance agency powers.

The language of Section 92 provides no basis for the Comptroller's distinction between "general" insurance agency activity and the sale of "specialized" insurance products like annuities, which the Comptroller claims that large-town national banks can handle. The Comptroller also demonstrates his lack

of experience with insurance when he claims that annuities are not insurance under Section 92.

Insurance experts have agreed throughout the nineteenth and twentieth centuries that annuities insure against the loss of income that often accompanies aging and retirement. Just as life insurance protects against the loss of income due to premature death, annuities protect against the loss of income due to the passage of time. Moreover, the Comptroller's emphasis on dictionary definitions of insurance as an "indemnity" is misplaced, because neither life insurance nor annuities are properly characterized as indemnities.

Both annuities and life insurance share the basic insurance characteristics of: (i) protecting against the loss of income (ii) by pooling contributions of many individuals and sharing mortality-based risks among them, and (iii) basing premiums and payouts on actuarial predictions of mortality.

State insurance law overwhelmingly agrees with the conclusion that annuities are insurance. Because of its traditional primacy in insurance regulation, state law is particularly significant here. When Section 92 was adopted, the statutes of 38 states defined the sale of annuities as part of the insurance business; today, 42 states specifically define annuities as insurance.

Section 24(7) presents a second barrier to the Comptroller's Approval. The sale of annuities cannot be found in any of the express powers granted to national banks by that statute. Indeed, the bank powers clause of Section 24(7) was based on the New York Free Banking Act of 1838, which was construed in 1857 not to grant state banks any powers to engage in insurance activities, including annuities. When Congress borrowed that provision in 1863 in the predecessor to Section 24(7), it necessarily adopted that construction for national banks as well.

Nor can the power to sell annuities be found in the grant of "such incidental powers as are necessary to the business of banking." That provision is not an elastic grant of whatever power might allow a national bank to enter a profitable new line of business; it gives authority only for those activities directly related to an express power of national banks.

The Comptroller has no support for his claim that annuities are a "financial investment instrument" of the type that national banks historically have brokered. The brokerage authority of national banks has been limited to generally marketable securities; there is no market for any individual's annuity. Accordingly, the sale of annuities is neither a traditional bank activity nor tied directly to any express banking power, and thus is not within Section 24(7). Even if the power to sell annuities could be found within Section 24(7), that general statute would be overridden by the specific prohibition in Section 92.

The Comptroller demands judicial deference for his views on these points, repeatedly citing *Chevron U.S.A. v. Natural Resources Defense Council*, *supra*, and similar cases. Fed. Br. 15, 23-24, 25, 37, 43. The NationsBank petitioners invoke *Chevron* no fewer than ten times. NationsBank Br. 14, 15, 16, 17, 22, 39, 40, 41, 42, 43, 45.

This clamor for judicial deference cannot conceal the Comptroller's failure to "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. The Comptroller's misapplication of *Chevron* is based on his failure to "employ[] traditional tools of statutory construction," *id.* at 843 n.9, including examining the statutory structure and language, considering the legislative genesis of both Section 92 and Section 24(7), reviewing the historical understanding of what annuities and insurance are, and applying the *expressio unius* principle. These "traditional tools of statutory construction" demonstrate that Congress intended to deny insurance agency

powers to national banks in larger communities. *Chevron* requires the Comptroller to "give[] effect" to that intent.

Just as fundamental, however, is the Comptroller's misunderstanding of the character of insurance and annuities, a misunderstanding that reflects his agency's lack of experience with insurance. The Comptroller has embraced concepts that have been rejected by his predecessors, by most state legislatures, by insurance scholars, and by this Court. Even at its most deferential, *Chevron* requires that a statutory interpretation be "rational and consistent with the statute." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987)). *Chevron* does not require deference to error.

## ARGUMENT

### I. SECTION 92 BARS NATIONAL BANKS FROM SELLING ANNUITIES IN TOWNS WITH POPULATION OVER 5,000

The Comptroller cites two grounds for rejecting the application of Section 92 to bar NationsBank's sale of annuities: (i) because Section 92 supposedly does not reach "specialized insurance products," and (ii) because he claims that annuities are not insurance. Both contentions are contrary to the congressional intent in Section 92 as determined by the traditional tools of statutory construction, and are not reasonable.

#### A. By Granting Certain Insurance Powers To National Banks In 1916, Congress Denied Any Other Insurance Powers

Our construction begins with the language of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991). Section 92 provides:

> In addition to the powers now vested by law in national banking associations . . . [,] any such asso-

> ciation located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may . . . act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance . . . .

By granting only to small-town national banks the specific power to serve as agent for an insurance company to sell insurance, the statute reflects the congressional intent that other national banks have no insurance agency powers.

The Comptroller concedes that "Section 92 carries some negative implication; Congress would have had little reason to grant small-town banks the power to act as general insurance agents if it had thought, in 1916, that any national bank could already do so under Section 24 Seventh." Fed. Br. at 40-41.

Petitioners argue that although Section 92 bars national banks in larger communities from "unrestricted operation of a general agency for fire, life or other casualty insurance," it allows the sale of "specialized" insurance products; they also suggest that the *expressio unius* principle somehow conflicts with *Chevron*. *See* Fed. Br. at 39-41; NationsBank Br. at 37-39. The first contention has no basis in Section 92; the second is wrong.

### 1. The Legislative Genesis of Section 92

The legislative genesis of Section 92, which petitioners largely ignore, establishes that Congress intended that only small-town national banks have any insurance agency powers. The Comptroller of the Currency and the Federal Reserve Board concluded in 1915 and 1916 that national banks had no authority, express or implied, to engage in insurance agency activities. *See* pp. 2-3, *supra*. Finding that "writing insurance on commission is in no sense incidental to any of the enumerated powers of a national bank," the Board wrote that "[a]ny such extension

of the powers of national banks must be left to the consideration of Congress." 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916).

One year later, Comptroller Williams heeded that advice and proposed enactment of Section 92. In his letter to Congress, the Comptroller affirmed that national banks had no power to act as insurance agents. 53 Cong. Rec. 11,001 (1916). Comptroller Williams asked Congress to grant some insurance agency powers to national banks, but stressed that this new authority "should be limited to banks in small communities" because those banks presented a case of special need. *Id.* Citing public policy concerns, Comptroller Williams pointedly stated (*id.*):

> I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores.

Comptroller Williams' explanation of the purposes of Section 92, which he drafted, must be accorded great weight in determining Congress' intent. *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982). Comptroller Williams' views are particularly significant both because they are the contemporaneous construction by the executive official charged with implementing the statute, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and because he "participated in developing the provision." *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

### 2. This Court Has Long Relied upon the *Expressio Unius* Principle

The Fifth Circuit's application of the *expressio unius* principle is solidly grounded in this Court's rulings. *United States v. Arredondo*, 6 Pet. (31 U.S.) 691, 725 (1832) (*Expressio unius*

"is an universal maxim in the construction of statutes"). Indeed, Congress is presumed to draft legislation so that strict application of the *expressio unius* rule will conform precisely to its will. *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (unanimous).

This Court has relied on the *expressio unius* principle in dozens of cases. *First Nat'l Bank v. National Exch. Bank*, 92 U.S. 122, 128 (1876), applied the principle to the incidental powers clause of Section 24(7), explaining that "[d]ealing in stocks is not expressly prohibited [to national banks]; but such a prohibition is implied from the failure to grant the power." *See also Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942) ("a legislative affirmative description implies denial of the non-described powers") (internal quotation marks omitted); *United States v. Sweeny*, 157 U.S. 281, 286 (1895); *Camp v. Gress*, 250 U.S. 308, 315 (1919) (Brandeis, J.).[2]

Nor is the Court's reliance on the *expressio unius* principle confined to ancient precedent. Two Terms ago, a unanimous Court employed the principle to reject a heightened pleading standard for civil rights cases alleging municipal liability. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993). *See also Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) (applying principle); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (by authorizing certain private lawsuits against Amtrak, Congress impli-

[2] Other early cases in which the Court relied upon the *expressio unius* principle include: *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898); *Burck v. Taylor*, 152 U.S. 634, 648 (1894); *United States v. Erwin*, 147 U.S. 685 (1893); *United States v. County of Macon*, 99 U.S. 582, 590 (1879); *Arthur v. Cumming*, 91 U.S. 362, 364 (1876); *Pine Grove v. Talcott*, 19 Wall. (86 U.S.) 666, 674-75 (1874); *Sturges v. Draper*, 12 Wall. (79 U.S.) 19, 27 (1871); *Fanning v. Gregoire*, 16 How. (57 U.S.) 524 (1854); and *Wood v. United States*, 16 Pet. (41 U.S.) 342, 364 (1842) (Story, J.).

edly precluded other claims); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958) (applying *expressio unius*).

As one of the "traditional tools of statutory construction," the *expressio unius* principle should be employed under *Chevron*, and the court of appeals properly did so. Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829, 839 (1990) (endorsing *expressio unius* as useful tool under *Chevron* for ascertaining congressional intent).

### 3. The Comptroller May Not Redraft Section 92

Both *expressio unius* and the legislative genesis of Section 92 establish the Comptroller's error in viewing Section 92 as permitting the sale of "specialized" insurance products in larger towns. The Comptroller's contention finds no textual support in Section 92. The concepts of "general" and "specialized" insurance products are nowhere in the statute, which bars national banks from acting as agent for "any" insurance company in the sale of "insurance," whether it be termed "general" or "specialized." Indeed, the Comptroller offers no principled standard by which a "general" insurance product might be distinguished from a "specialized" product, except to assert that he has the authority to do so. Fed. Br. at 41.

Because he cannot base his argument on the text of the statute, the Comptroller proposes to redraft Section 92. Brandishing the maxim *ejusdem generis*, the Comptroller asserts that although the statute bars national banks from acting as agent for "any fire, life, or other insurance company," Congress really meant to say "fire, life, or other *general* insurance company." Fed. Br. at 41; *see also* NationsBank Br. at 46-47; NationsBank Pet. App. 43a. Redrafted in this manner, the Comptroller argues, Section 92 relates solely to "general" insurance companies and their products, and does not restrict national bank sales of

"particular" insurance products (like annuities) that he may decide are "incidental to the business of banking." *Id.*

The Comptroller's redrafting cannot succeed. The Comptroller and Congress understood in 1916 that national banks had no authority to sell any kind of insurance, *see* pp. 12-13, *supra*, and nothing in Section 92 vaguely resembles an affirmative grant of insurance powers to large-town banks.

Moreover, the adjectives "fire, life or other" modify the couplet "insurance company," not the single word "insurance." Although the word "insurance" appears later in the statute, it arises in a different clause and is not modified in any manner; "fire, life or other" modifies only "insurance company." Petitioners long have conceded that NationsBank is selling annuities as agent for "life insurance" companies. R. 53-55. Using the statutory language, NationsBank thus seeks to "act as the agent" for a "fire, *life* or other insurance company." Inserting "general" before "insurance company" would not help the Comptroller's argument at all.[3]

### B. The Comptroller Erroneously Concluded That Annuities Are Not Insurance

The Comptroller concedes that "annuities have historically been a product of insurance companies" and that annuities, like conventional life insurance, typically possess an "element of mortality risk." NationsBank Pet. App. at 38a. The Comptroller ruled as recently as 1978 that the sale of annuities by a national bank "would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. § 92."

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[3] If the adjectives "fire" and "life" have any significance beyond mere recitation of two common examples of insurance companies, it is to illustrate that Congress intended for Section 92 to apply to all lines of insurance. That is, Section 92 applies not only to policies of indemnification (such as "fire" and other casualty insurance), but also to policies of insurance that pay a defined sum of money upon determinable contingencies (like "life" insurance and annuities). *See* pp. 21-23, *infra*.

R. 7-8 (reproduced at Brief in Opp. App. 1a). The Comptroller now insists that annuities are not insurance under Section 92. But as this Court repeatedly has stated, an agency interpretation of a statute "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).[4]

The Comptroller's reversal of position is based on his misunderstanding of annuities and insurance, upon a few incomplete dictionary definitions, and upon a smattering of case law which he misconstrues. Before according *Chevron* deference, this Court must employ "traditional tools of statutory construction" to determine whether the word "insurance" in Section 92 includes annuities. Even according deference, the Comptroller's conclusions are not rational or consistent with the statute and cannot be sustained.

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[4] The Comptroller attempts to dismiss his 1978 ruling as "informal advice by an agency lawyer," and advances the same rationale for avoiding his 1982 ruling that Section 92 prohibits national banks from selling life insurance. Fed. Br. at 38 n.19. This rationale is totally inconsistent with the Comptroller's reliance in his brief upon other opinions by OCC legal staff. *See, e.g.*, Fed. Br. at vii-viii (citing OCC Letter Nos. 271, 331 and 499); NationsBank Br. at viii-ix (citing OCC Letter Nos. 271, 331, 429 and 499). For example, petitioners rely on the Comptroller's 1985 decision to allow national banks to sell variable annuities (OCC Ltr. 331), *see* Fed. Br. at 7, 8, 28; that decision came in a letter by the Assistant Director of OCC's Legal Advisory Services Division, the same official who signed the Comptroller's 1978 and 1982 rulings on which we rely. Moreover, FDIC regulations treat all OCC legal opinions as authoritative, including those signed by the Assistant Director of the OCC's Legal Advisory Services Division. *See* 58 Fed. Reg. 64483 (Dec. 8, 1993) (state banks may rely on "any order or interpretation issued in writing" by OCC).

### 1. Annuities Are Insurance

The most traditional mode of statutory construction is to examine the meaning of the central terms according to historical context, common understanding, and the understanding of those terms in other legal settings. "Insurance," as used by Congress in 1916, included annuities.

After a brisk trot through a few dictionary definitions, the Comptroller announced his view that "annuities are not insurance" because they do not incorporate "the element of indemnification against risk." NationsBank Pet. App. 44a-45a; *see id.* 47a (annuities "lack the basic insurance characteristic of indemnification against risk"); Fed. Br. 25. But the Comptroller ignores the risk against which annuities insure, and indemnification is not the sole hallmark of insurance.[5]

Insurance scholars largely agree that annuities are insurance, stressing that annuities insure against the loss of income that may accompany aging and retirement. One work states succinctly: "The annuity is true life insurance. It is insurance against living too long — against outliving one's ability to provide an income for himself." Robert I. Mehr *et al.*, *Principles of Insurance* 538 (4th ed. 1966). Another recent text also defines annuities as insurance, explaining that annuities "protect against the possibility of outliving one's income." Kenneth Black, Jr. & Harold D. Skipper, Jr., *Life Insurance* 147-48 (12th ed. 1994); *see* Frederick G. Crane, *Insurance Principles and Practices* 254 (2d ed. 1984) ("life annuities are a form of insurance").

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[5] Had he read his dictionaries more carefully, the Comptroller might have avoided this error. The most recent volume of *Black's Law Dictionary* (6th ed. 1990) includes the definition of "annuity policy" as "An insurance policy providing for monthly or periodic payments to insured to begin at fixed date and continue through insured's life". *Id.* at 90; *see id.* at 802 ("annuity insurance" is an "insurance contract calling for periodic payments to the insured or annuitant for a stated period or for life").

Broadly defined, insurance is a "formal social device for reducing risk by combining exposures." *Glossary of Insurance Terms* 77 (Robert W. Osler and John S. Bickley, eds., 1972); *see also* John R. Ingrisano & Corinne M. Ingrisano, *The Insurance Dictionary* 152 (3d ed. 1990) (defining insurance as a "[p]rotection, through specified money compensation or reimbursement for loss provided by written contract against the happening of specified chance or unexpected events"). As this Court explained in *Helvering v. Le Gierse*, 312 U.S. 531, 539 (1941), "risk-shifting and risk-distributing" are the hallmarks of insurance. *See* H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943) (McCarran-Ferguson Act) (insurance is "the distribution of risk according to hazard, experience, and the law of averages"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220-21 (1979). The nature of the risk assumed determines the kind of insurance involved.

Life insurance is a "contractual system of risk-sharing under which contributions are accumulated and redistributed to meet the economic consequences of the uncertain duration of life." *Merritt Glossary of Insurance Terms* 117 (Thomas E. Green 5th ed. 1993). Some state statutes define life insurance to include contracts "conditioned upon the continuance or cessation of human life." *See, e.g.*, Miss. Code Ann. § 83-19-1(j) (1993); N.C. Gen. Stat. § 58-58-1 (1991); Tex. Ins. Code Ann., art. 3.01, § 1 (1994). That statutory formulation illustrates how annuities properly are viewed both as a type of life insurance and as the "opposite" of conventional life insurance. Annuities insure the risks of long life ("continuance" of human life), while conventional life insurance insures the risk of brief life ("cessation" of life).

A leading text explains the relationship between annuities and conventional life insurance, and why annuities are insurance (*McGill's Life Insurance* 109-10 (Edward E. Graves & Lynn Hayes, eds., 1994) (emphasis in original):

> The primary function of life insurance is to *create* an estate or principal sum; the primary function of an annuity is to *liquidate* a principal sum, regardless of how it was created. Despite this basic dissimilarity in function, life insurance and annuities are based on the same fundamental pooling, mortality and investment principles.
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> In the first place, both life insurance and annuities protect against loss of income. Life insurance furnishes protection against loss of income arising out of premature death; an annuity provides protection against loss of income arising out of excessive longevity. It might be said that life insurance provides a financial hedge against dying too soon, while an annuity provides a hedge against living too long. From an economic standpoint, both contingencies are undesirable. A second common feature is the utilization of the pooling technique. Insurance is a pooling arrangement whereby all make contributions so that the dependents of those who die prematurely are partially compensated for loss of income; an annuity is a pooling arrangement whereby those who die prematurely make a contribution on behalf of those who live beyond their life expectancy and would otherwise outlive their income. A third common feature is that the contributions in each case are based on probabilities of death and survival as reflected in a mortality table.... Finally, under both arrangements, contributions are discounted for the compound interest that the insurance company will earn on them.

*See* Black & Skipper, *supra*, at 149; ("annuities are simply another type of insurance, and both life insurance and annuities are based on the same fundamental principles"); Crane, *supra*, at 251 (annuities and life insurance both "are based on the law

of large numbers, both are insurance, and the rates for both are based on average mortality rates").

Thus, while annuities and conventional life insurance both involve the transfer and distribution of mortality risk, they approach that risk from opposite directions (William R. Vance, *Handbook on the Law of Insurance* 32 n.24 (3d ed. 1951) (citing Hardy, *Risk and Risk-Bearing* 67 (1931)):

> [T]he uncertainty of the length of human life . . . takes two forms — the risk that one may live so long as to use up the funds which he has provided to support himself in old age and the risk that he may die before the end of his normal working life. Each contingency needs to be provided against.[6]

The Comptroller relies on dictionary definitions that stress the concept of indemnity, a feature of property or casualty insurance. But that reliance ignores the plain fact that some types of insurance — life insurance and annuities — are not indemnities. As *McGill's Life Insurance* observes (*supra*, at 752), "A life insurance policy therefore is not a contract of indemnity, but one to pay a stated sum." *See* Vance, *supra*, at 106 (life insurance "in no way resembles a contract of indemnity"); 43 Am. Jur. *Insurance*, § 3 (1982) ("contract of life insurance is not one of indemnity, but is an absolute engagement to pay a certain sum at the end of a definite or indefinite time").

Indemnification entails providing a "security against hurt, loss, or damage." *Webster's Tenth New Collegiate Dictionary* 591 (1993). In the case of fire or property insurance, the insurer indemnifies the risk that a loss may take place within a given term. A specific insured may not experience any loss, or any

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[6] It makes no difference whether a particular annuity contract takes the form of an immediate annuity, where the payments to the annuitant begin immediately, or a deferred annuity, where the insurer's payments are delayed until an agreed-upon date. The insurance company assumes a mortality risk at the inception of either contract. *See also* n. 12, *infra*.

loss may be small, but the insurance company takes the risk that the total actual losses will be more or less than the premiums paid plus investment income. In the case of life insurance, however, the event upon which payment is to be made is certain to occur. As one authority explains, the certainty of death (Vance, (3d ed.), at 105):

> introduces into this contract of life insurance a predominant element of speculative investment. The presence of this element necessarily precludes the application of the principle of strict indemnity, since, as is easily seen, in the average case the insurer only pays back the money that has been given to him to hold in quasi trust for the insured plus interest and less expenses.

Second, life insurance is not a contract of indemnity because of "the difficulty to be encountered in fixing any sort of pecuniary value upon life." *Id.* at 106. The insured "might be one whose life was rather a burden upon the [beneficiary] than a benefit possessing a pecuniary value." *Id.* In contrast, the loss from a burned-down building can be quantified far more objectively. *See McGill's Life Insurance*, *supra*, at 752 (life insurance is not indemnity because "the value of a person's life to that person is without limit, [so] no sum payable upon his or her death will be in excess of the loss suffered").[7]

For over one hundred years, this Court has recognized that life insurance is not a pure indemnity, but is simply a contract "to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen." *Central Nat'l Bank of Washington v. Hume*, 128 U.S. 195, 205 (1888). *See also Grigsby v. Russell*, 222 U.S. 149, 156 (1911) (Holmes, J.) (view

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[7] The practical effect of life insurance not being an indemnity is that subrogation does not apply to life insurance policies. Accordingly, a life insurer cannot be subrogated to a claim by the decedent's estate that death was caused by the negligence of a third party.

that life insurance is contract of indemnity "long has disappeared"). As explained in *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. (80 U.S.) 616, 619 (1871) (citing *Dalby v. India & London Life Assurance Co.*, 15 C.B. 365 (1854)):

> Life insurances have sometimes been construed [as contracts of indemnity], but the better opinion is that the decided cases which proceed [in this fashion] are founded in an erroneous view of the nature of the contract. . . . Insurers in such a policy contract to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appears that the stipulated event has happened . . . as the contract is not merely for an indemnity, as in marine and fire policies.

Annuities are the same. After the annuitant has paid the stipulated premium or premiums (during the accumulation phase), the insurance company pays a certain sum to the annuitant so long as he or she is still living (the "stipulated event"). The statutes of twenty-three states define insurance as contracts providing for payments upon "determinable contingencies," a formulation that includes both indemnity and non-indemnity insurance. *See* Appendix A, *infra*.

The different purposes for annuities and conventional life insurance — one insuring against long life and the other against premature death — largely explain the court rulings inaptly cited by the Comptroller to support his theory that annuities are not insurance. *See* NationsBank Pet. App. 45a; *see also* Fed. Br. at 36, NationsBank Br. at 42.

*Helvering v. Le Gierse* and *Estate of Keller v. Commissioner*, 312 U.S. 543 (1941), did not consider whether annuities are insurance. Rather, those cases held that proceeds from a life insurance policy did not qualify for exclusion as "insurance" from decedent's gross estate for federal tax purposes. The life

insurance was purchased simultaneously with annuities, within a month of impending death, as part of a scheme to avoid estate taxes. The mortality risk of the life insurance policies and the annuities, being opposites, "counteracted each other" so no real risk was transferred. *Le Gierse*, 312 U.S. at 541. This Court's refusal to be taken in by tax avoidance schemes certainly does not establish that annuities are not "insurance" under Section 92. *See In re Rhodes' Estate*, 197 Misc. 232 (N.Y. Surr. Ct. 1949) (same; "death benefit" component of annuity contract did not qualify for insurance tax exclusion because mortality risk was offset by annuity component). In fact, by holding that the mortality risk of annuities "counteracted" the mortality risk of life insurance, *Le Gierse* acknowledged that annuities do involve the assumption of mortality risk.[8]

Similarly, *Kernochan v. United States*, 29 F. Supp. 860 (Ct. Cl. 1939), *cert. denied*, 309 U.S. 675 (1940), did not hold that annuities are not insurance. *Kernochan* held that a widow's "refund" of the decedent's payments into a retirement fund did not qualify for exclusion from his estate as life insurance. *Accord In re Southern's Estate*, 257 A.D. 574, 576 (1939) (noting that "joint survivorship annuity" would qualify as insurance).[9] *In re Walsh*, 19 F. Supp. 567, 572 (D. Minn. 1937),

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[8] A number of federal tax statutes define annuities to be insurance. *See* 26 U.S.C. § 816(a) ("life insurance company" defined as "an insurance company which engages in the business of issuing life insurance and annuity contracts"); 26 U.S.C. § 408(b) ("individual retirement annuity" defined as "an annuity contract . . . issued by an insurance company"); 26 U.S.C. § 501(m)(4) ("[f]or purposes of this subsection, the issuance of annuity contracts shall be treated as providing insurance"); 26 U.S.C. § 814(b) ("insurance contract" defined to include "annuity contract").

[9] The Comptroller cites several other decisions involving interpretation of state tax laws. *See People ex rel. Metropolitan Life Ins. Co. v. Knapp*, 193 A.D. 413 (1920); *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510 (1916); *Daniel v. Life Ins. Co.*, 102 S.W.2d 256 (Tex. Civ. App. 1937); and *State ex. rel. Equitable Life Assurance Soc'y v. Ham*, 54 Wyo. 148 (1939); *see also Corporation Comm'n v. Equitable Life Assurance Soc'y*, 73 Ariz. 171 (1951).

held that an annuity did not qualify for a life insurance exclusion because the "primary purpose" of the exclusion was to protect the beneficiaries of life insurance policies. Because annuities primarily benefit the insureds, the exclusion did not apply.

### 2. When Section 92 Was Enacted, Annuities Uniformly Were Understood to Be Insurance

A second traditional tool of statutory construction is to examine the common understanding of a disputed term at the time the statute was enacted. While construing "insurance" in the McCarran-Ferguson Act, this Court observed that the "contemporary perception" of the meaning of insurance "is highly significant in ascertaining congressional intent." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 227 (1979). Accordingly, it is "highly significant" that annuities were understood in 1916 to be a product of a "fire, life, or other insurance company" involving the sale of "insurance." The Comptroller has never addressed this question.

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Each of these cases held that the annuity "premiums" received by insurance companies were not taxable under state law as premiums of insurance. As the Comptroller has cautioned, however, the tax treatment of annuities is not necessarily meaningful in determining whether annuities are insurance. Fed. Pet. at 12, n.4. The special tax treatment of annuity premiums has been codified in the Internal Revenue Code, without affecting other provisions of the federal tax code that define annuities as insurance. *See* 26 U.S.C. §§ 805(a)(2), 807(b),(c)(1), 816(b)(1) (annuity premiums reserved for future payment not taxed). In any event, the cases cited by the Comptroller reflect a minority view of the narrow state tax issue presented, and were aptly criticized in *Bankers Life Ins. Co. v. Laughlin*, 160 Neb. 480 (1955) (collecting contrary authorities from Iowa, New Hampshire, Missouri, Massachusetts, Arkansas, Kansas, California, and Mississippi).

### a. Annuities Have Been Viewed as Insurance since the Origin of the Life Insurance Business

Annuities have been part of the insurance business for hundreds of years. *See SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 81 (1959) (Brennan, J., concurring) ("the granting of annuities has been considered part of the business of life insurance"). Indeed, life insurance and annuities have been sold by life insurance companies since the first insurers were established in England and in this country.

The first insurance company in England was founded in 1698 as "a widow's fund, an annuity scheme." 1 Joseph A. Joyce, *A Treatise on the Law of Insurance of Every Kind* 43 (2d ed. 1917). The creation of corporations in America with the power both "to insure lives and grant annuities" dates back to before the Revolution. George Richards, *A Treatise on the Law of Insurance* 17 (3d ed. 1909). Founded in the 1760s for the benefit of Protestant clergy, the first chartered insurance companies in this country offered annuities. Joyce, *supra*, at 44-45. Life insurance "at the time of its original introduction" took two forms: ordinary whole life insurance and the granting of annuities. J. H. James, *A Practical Treatise on Life and Fire Assurance; Annuities and Reversionary Sums; and Leases for Terms and For Lives* 24 (London, Doughty & Co. 1868).

Throughout the nineteenth century, annuities were understood to be part of the insurance business. In 1812, Pennsylvania granted a charter to the Pennsylvania Company for the Insurance on Lives and Granting Annuities, "the first North American insurer organized for the sole purpose of selling life insurance and annuities to the general public." Black & Skipper, *supra*, at 53. A leading commentator wrote in 1868 that annuities are a form of life insurance. James, *supra*, at 28.

Several varieties of annuities developed during the 1800s. J. H. James in 1868 reported the availability of (i) "survivorship

annuities" ("payable to one person on the death of another"), (ii) "deferred annuities" ("payable on and after the attainment of a given age"), (iii) "immediate annuities," and (iv) annuities with refund features ("annuity-assurances") ("a yearly allowance is made to the purchaser during life, and an agreed portion of the deposit is returned ... on death").[10] James characterized all of these annuities as "Life Assurance." *Id.* at 24-29. *See also* Joseph K. Angell, *A Treatise on the Law of Fire and Life Insurance* xi, 303-04 n.2 (Boston, Little, Brown & Co. 1854) (describing immediate, deferred and survivorship annuities as "official forms" of life insurance).[11]

Annuities were still regarded as insurance in the years immediately preceding enactment of Section 92. A leading 1915 textbook classified annuities as one "leading group[]" of life insurance. Solomon S. Huebner, *Life Insurance* 47, 58 (1915). Professor Huebner observed that annuities protect against the "hazard" of outliving one's income, and are based on the same principles as conventional life insurance. *Id.* at 111. *Accord* Lester W. Zartman and William H. Price, *Life Insurance* 278 (1914) ("function of life insurance is to protect the family and to provide . . . for old age"). He described various kinds of then-current annuities, including immediate annuities, deferred annuities, life annuities, term annuities, single premium annuities, level premium annuities, joint survivor annuities, and annuities with refund features. Huebner, *supra*, at 58-59; *see* A. Fingland Jack, *An Introduction to the History of Life Assurance* 165 (1912) (annuity contract "certainly is life assurance");

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10 Mr. James claimed that he invented refund annuities.

11 Annuities always have been paired and associated with life insurance, especially in the context of state insurance statutes. *See* pp. 29-30, *infra*. Applying the principle *noscitur a sociis* ("a word is known by the company it keeps"), annuities should be deemed a form of life insurance. *See, e.g.*, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying principle).

William A. Kerr, *The Law of Insurance* 12-13 (1902) (defining "insurance" to include annuities).

The Comptroller thus erred when he claimed that deferred annuities and refund annuities are "modern" and "contemporary" inventions that are "even less like insurance" than the "classic immediate-payout, lifetime-based fixed annuity." Fed. Br. at 28-34. There is nothing "modern" about deferred annuities or refund annuities, which insurers had been selling for more than fifty years when Congress enacted Section 92. Like so-called "classic" annuities, these products uniformly were considered to be insurance.[12]

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[12] Part of the Comptroller's confusion regarding "modern" annuities may be due to his slavish reliance upon a single source, David Shapiro and Thomas Streiff, *Annuities* (1992), which is cited sixteen times in his brief. That 113-page volume was written by two financial planners and is intended primarily to provide "information on how to position and market annuities." *Id.* at iii, ix. It makes no pretense of being a scholarly work, but is principally a marketing manual. Indeed, the book commits serious historical errors. For example, the authors assert that before the 1970s "annuities had no provision for liquidity or other cash benefits other than annuitization," *id.* at 6, even though refund annuities were available one hundred years earlier. *See* pp. 26-27, *supra.*

The Comptroller also misunderstands refund annuities generally. He claims that because a refund annuity may return the principal if the purchaser dies during the payout phase, it "eliminate[s] any mortality risk on the part of the purchaser" Fed. Br. at 34, and is therefore not insurance. This assertion turns the basic concept of insurance on its head. The purchaser of insurance, including a refund annuity, wishes to transfer as much mortality risk to the insurer as possible. The function of insurance is to "reduc[e] risk by combining exposures," *Glossary of Insurance Terms, supra,* at 77, which a refund annuity achieves admirably. The issuer of the refund annuity assumes from the purchaser both types of mortality risk: early death and long life. The Comptroller's "critique" of refund annuities establishes that they are insurance.

The Comptroller also errs when he claims there is "no mortality risk" in hypothetical deferred annuities that offer the option, at the end of an accumulation period, to take a lump sum payment, or the option for fixed payments for a term certain, or the option for "systematic withdrawals"

### b. The States in 1916 Considered Annuities to Be Insurance

In the years prior to 1916, most state law also recognized that annuities are insurance. By 1916, eighty percent of the States (38 of 48 states) had enacted statutes declaring that the business of insurance included the granting of annuities. See Appendix B, *infra* (listing state statutes).

The first general law in New York for incorporating insurance companies gave insurance companies the power "to make insurance upon the health or lives of individuals and every insurance appertaining thereto or connected with health or life risks, and to grant, purchase, or dispose of annuities." 1849 N.Y. Laws ch. 308, § 1; *see also* 1850 Wis. Laws ch. 232, § 1. California, like many other states, expressly classified annuities as a form of life insurance. 1915 Cal. Stat. ch. 768, § 1. *See, e.g.*, Ariz. Rev. Stat. § 3428(2) (1913); 1899 Ind. Acts ch. 28, § 1; 1893 Ky. Acts ch. 171, § 106; 1869 Mich. Pub. Acts 77, § 1; 1913 Neb. Laws ch. 154, § 78; 1872 Ohio Laws 150 ch. 2, § 1; 1875 Tenn. Pub. Acts ch. 142, § 10; 1909 Tex. Gen. Laws ch. 108, § 1; 1913 Wash. Sess. Laws ch. 109, § 2.

The contemporaneous views of the States are particularly critical to understanding the meaning of "insurance" in Section 92 because state law has predominated in insurance matters. After this Court held that the regulation of insurance was outside Congress' constitutional authority, *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 183 (1869), "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978).[13] As this Court

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through death of the purchaser. Fed. Br. at 34. So long as one of the options offered in an annuity includes a benefit defined by the purchaser's life, the issuer assumes mortality risk from the moment the contract is signed. That mortality risk will be relieved if the purchaser exercises a withdrawal option, for example, but would have been present for the entire preceding period.

[13] State regulation of insurance remains paramount despite this Court's 1944 ruling that insurance is in interstate commerce and subject to federal

recognized in *SEC v. VALIC*, "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition." 359 U.S. at 68-69. In contrast, the Comptroller has virtually no experience with insurance or annuities.

The States overwhelmingly continue to provide that annuities are insurance. As the court of appeals observed, "[a]ll fifty states currently regulate annuities under their insurance laws." NationsBank Pet. App. 11a (collecting authorities). Forty-two states currently have statutes expressly defining annuities as insurance, as a kind of insurance, or as life insurance. *See* Appendix A, *infra* (listing state statutes).

### 3. Like Life Insurance, Annuities Have Some Investment Function

The Comptroller insists that annuities are not insurance because "they are primarily a vehicle for investment." NationsBank Pet. App. 45a; *see also* Fed. Br. at 34-37; NationsBank Br. at 41-42. The presence of an investment feature in annuities is not inconsistent with its character as insurance. Justice Holmes wrote that "life insurance has become in our days one of the best recognized forms of investment and self-compelled saving." *Grigsby v. Russell*, 222 U.S. 149, 156 (1911). Several years earlier, Professor Vance observed that life insurance "is not now confined to mere insurance against the risks and accidents of life, but also includes, as perhaps its most important element, the feature of investment." William R. Vance, *Handbook of the Law of Insurance* 16 (1904). Vance emphasized the dual nature of life insurance: the pooling of mortality risk and the "investment of savings." *Id.* at 16-17.

Most life insurance policies have significant investment components. Traditional whole life insurance has many invest-

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jurisdiction. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). After that decision, Congress swiftly adopted the McCarran-Ferguson Act, 59 Stat. 34 (1945), to "restore the supremacy of the States in the realm of insurance." *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993).

ment features, yet it is undeniably insurance.[14] *See* OCC Ltr. No. 241; Vance, (3d ed.), *supra*, at 105 (life insurance has a "predominant element of speculative investment"). Albert H. Mowbray *et al.*, *Insurance* 307 (6th ed. 1969) ("All basic [life insurance] policies other than term insurance include a savings or investment component"). That an insurance product also performs some investment function cannot mean that the product is not insurance under Section 92.[15]

### 4. All of NationsBank's Annuities Are Insurance

The annuities to be sold by NationsBank include the right to select either a fixed annuity, or a variable annuity, or some combination of fixed and variable features. NationsBank Pet. App. 35a. All of NationsBank's annuities are insurance under Section 92 because, applying the criteria developed by insurance experts, (i) they protect against the loss of income due to long life, (ii) they pool the contributions of many individuals and share the mortality-based risks among them, and (iii) their premiums and payouts are based on actuarial predictions of mortality.[16]

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[14] One such "investment" feature of traditional whole life insurance is the steady accumulation of cash value, upon which the insurer pays interest or dividends. *See* IV Loss, *Securities Regulation* 2534 (supp. ed. 1969) (defining "continuous spectrum" from pure insurance through pure investment, where "straight life" and "annuities" are toward the center).

[15] The NationsBank petitioners mistakenly suggest that *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), supports their view that annuities are not insurance. NationsBank Br. at 44. That case held only that certain aspects of a group annuity contract did not qualify as a "guaranteed benefit policy" under the Employee Retirement Income Security Act of 1974 (ERISA). *John Hancock* did not consider whether annuities are insurance.

[16] The Comptroller complains that annuities for a term certain (that is, not tied to the span of any individual's life), lack mortality risk and should not be deemed insurance. Fed. Br. at 34. Both the insurance industry and insurance regulators treat such annuities as insurance, but the question of their true nature is not before this Court. NationsBank has not proposed to sell term certain annuities.

The fixed annuity options offered by NationsBank are plainly insurance. In two cases construing federal securities laws, this Court confirmed the traditional view that fixed annuity contracts are insurance. *See SEC v. VALIC*, 359 U.S. at 69; *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 206 (1967). Thus, so long as a fixed annuity is one of the options available to NationsBank's annuity purchasers, the product is insurance and NationsBank cannot sell it. Although the Comptroller offers misleading statistics evidently designed to imply that fixed annuities are a trivial portion of the market, *see* Fed. Br. at 33 n.16, the financial planner's manual cited by the Comptroller reports that between 75 and 85 percent of annuity purchases are "fixed annuities." Shapiro and Streiff, *supra*, at 50.

This Court's recognition that fixed annuities are insurance also applies to the fixed annuity component of the combination fixed-variable annuities that NationsBank wishes to sell. *United Benefit*, at 206 ("provisions dealing with operation of the fixed-payment annuity were purely conventional insurance provisions"). Indeed, *United Benefit* involved a mixed annuity product (the "Flexible Fund") like some of those NationsBank seeks to sell. The fixed annuity component of combination annuities is certainly insurance under Section 92, so NationsBank cannot sell those, either.

Many variable annuities, in fact, guarantee a minimum return that operates like a fixed annuity. *See, e.g.*, R. 14 (NationsBank concedes that variable annuities "frequently . . . guarantee[] minimum investment return"). The Comptroller has admitted that fixed and variable annuities are "similar" and that "[b]oth can offer the investor a stream of payments extending over his life, and both may involve actuarial calculations." NationsBank Pet. App. 39a. *See also SEC v. VALIC*, 359 U.S. at 70 ("actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles"). The Comptroller has stated that the "only" difference is that fixed annuities

"offer a reduced level of risk," but the guaranteed return component of a variable annuity functions like a fixed annuity and is insurance under Section 92.

As the Comptroller concedes, many variable annuities also have a fixed payout. Fed. Br. 6. The mortality risk of those annuities plainly establishes that they are insurance. During the accumulation period, the purchaser's premiums are used to purchase "accumulation units" of the specified investment program. When the contract converts to the payout phase, the accumulation units are converted to annuity units. The value of the annuity units, which determines the size of the future payments to the annuitant, is based both on the value of the assets in the variable annuity account and on mortality expectations for the annuitant. *McGill's Life Insurance*, *supra*, at 123; Black & Skipper, *supra*, at 159-60; Mehr *et al.*, *supra*, at 409. The issuer assumes the mortality risk of having to make extra payments to long-lived purchasers beyond the value of the premiums paid plus investment earnings. A further element of mortality risk arises because most variable annuities "have some form of death benefit," Shapiro & Streiff, *supra*, at 60, requiring the return upon death of premiums paid regardless of the performance of the purchaser's variable annuity account.

Finally, even a pure variable annuity with a variable payout incorporates mortality risk when the accumulation units are converted to annuity units, and if there is a death benefit. These annuities, too, are insurance.

Although variable annuities were not developed until the 1950s, annuities already were widely differentiated by the time Section 92 was enacted in 1916. *See* pp. 26-27, *supra*. There is no reason to conclude that Congress in 1916 would have wanted to allow national banks to sell this newer variety of annuity any more than the many other varieties (*e.g.*, deferred annuities, refund annuities) then understood to be insurance. Moreover, variable annuities continue to be regulated as insur-

ance by the states. *See, e.g.*, Del. Code Ann. tit.18, §§ 1701(a), 1715 (a)(2) (1993); Fla. Stat. Ann. § 624.602(1) (West 1993); Neb. Rev. Stat. § 44-201 (3)(1990 supp.); N.H. Rev. Stat. Ann. § 401:1 (III)(1993 supp.); Or. Rev. Stat. § 731.154 (1993); Black & Skipper, *supra*, at 160.

Citing *SEC v. VALIC* and *United Benefit*, the Comptroller protests that variable annuities cannot be considered insurance under Section 92 since they have been deemed "securities" for purposes of federal securities regulation. *See* OCC Ltr. No. 331. Those cases did not hold that variable annuities are not "insurance," *per se*, nor did the Court find that "insurance" and "securities" are mutually exclusive terms. *See SEC v. VALIC*, 359 U.S. at 80-81 (Brennan, J., concurring) (variable annuities "[o]bviously . . . have elements of conventional insurance").

*SEC v. VALIC* and *United Benefit* held only that variable annuities do not qualify for the exemption from securities registration which Congress provided for "insurance" and "annuity contract[s]". The Court stressed that variable annuity contracts, regardless of their mortality risk, include some investment risk for the purchaser, since his return will vary according to the performance of the investments. Consequently, a variable annuity purchaser is entitled to disclosure of the insurer's investment policies through registration under the Securities Act of 1933. *SEC v. VALIC*, 359 U.S. at 77 (Brennan, J., concurring); *United Benefit*, 387 U.S. at 210. That holding is entirely consistent with the conclusion that because variable annuities include the pooling and spreading of mortality risk, they are "insurance" that national banks may not sell under Section 92.

This conclusion is reinforced by the regulatory treatment of "variable life insurance" (VLI), which provides both a guaranteed minimum death benefit plus a further death benefit determined on the basis of the performance of the specific investments made with the premiums paid. Black & Skipper, *supra*, at 114-17. The potential fluctuation of the additional

death benefit has prompted application of the federal securities laws to VLI policies to ensure that purchasers are informed concerning the controlling investment policies. *Id.* Nevertheless, VLI policies, like variable annuities, include mortality risk which is pooled and spread, and they are insurance.

## II. SECTION 24(7) DOES NOT AUTHORIZE NATIONAL BANKS TO SELL ANNUITIES

Americans have engaged in numerous disputes over the proper powers of banks in a democracy. *e.g., M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). Passions have run high on issues such as the First and Second Banks of the United States, both of which expired due to political opposition.[17] Bank failures often have triggered political reactions based on a mistrust of the concentrated economic power of banks. Only the bank panics of the late 19th and early 20th century overcame political opposition to the establishment of the Federal Reserve System, while the Great Crash of 1929 prompted the imposition of new restrictions on the scope of bank activities. *See* James J. White, *Banking Law*, 23-34 (1976); William Greider, *Secrets of the Temple*, 271-75 (1987).

The bank powers clause of Section 24(7) should be understood in the context of that history. The statute does not make a broad grant of powers to banks, but lists five specific powers: (i) discounting and negotiating promissory notes, drafts, bills of

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[17] In reflecting on the Second Bank of the United States, then-Chief Justice Taney wrote in 1845 that "the overthrow of *the Monster* was the greatest of all the public services of Genl. [Andrew] Jackson." R.B. Taney to Ellis Lewis, Oct. 25, 1845, *reprinted in* Carl B. Swisher, 5 *History of the Supreme Court of the United States: The Taney Period, 1836-64*, 127 (1974) (emphasis in original). If the bank had survived, Taney warned, "that corporation would at this day have been virtually governing the country; — corrupting its councils — & directing the operations of the government as might best suit the cupidity or ambition of those at the head of the corporation." *Id.*

exchange, and other evidences of debt; (ii) receiving deposits, (iii) buying and selling exchange, coin, and bullion, (iv) loaning money on personal security, and (v) obtaining, issuing, and circulating notes. As the Comptroller tacitly acknowledges, the sale of annuities fits within none of those specific powers.

Consequently, the Comptroller proposes an expansive reading of the statute's grant of "such incidental powers as shall be necessary to carry on the business of banking," and points to a supposed tradition of brokering "financial investment instruments." The statutory language supports neither proposition, both of which challenge over 150 years of limited national bank powers. Demanding *Chevron* deference yet again, petitioners argue that the "business of banking" has "evolv[ed]" into the business of "provid[ing] retail financial services." NationsBank Br. at 17-18; Fed. Br. at 23. Competitive pressures in the "dynamic financial services marketplace," they contend, have forced the Comptroller to permit "new and expanded activities not explicitly granted by Congress." *Id.*

The traditional tools of statutory construction, however, refute the Comptroller's position. The legislative genesis of Section 24(7) demonstrates that Congress intended to grant only limited powers to national banks, and the "business of banking" does not include the sale of annuities.

### A. When Congress Enacted Section 24(7), It Conferred Limited Powers Upon National Banks

#### 1. The New York Free Banking Act of 1838 Denied Banks the Power to Sell Annuities

As enacted in 1863, Section 24(7) was modeled on Section 18 of New York's Free Banking Law of 1838.[18] Petitioners

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[18] The New York Free Banking Act provided (1838 N.Y. Laws 245, 249, ch. 260, § 18):

> Such association shall have power to carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving

correctly observe that early decisions construing the New York statute are an important indicator of Congress' intent in enacting Section 24(7). Fed. Br. at 17; NationsBank Br. at 30 n.18.

The definition of bank powers in the New York Free Banking Act closely tracked individual banking charters in New York, which specified limited bank powers. Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 686 (1983) ("only the powers specifically granted could be exercised by a chartered bank"). Banks chartered under that Act were to have the same powers as banks with special charters. *Id.*

An early case under the New York Act held that banks had no power to traffic in stocks. *Talmage v. Pell*, 7 N.Y. 328 (1852). Since the statute included no express authority to deal in stocks, the court considered whether such activity was incidental to "the express powers of the association." *Id.* at 344. The court held that it was not, because the power to traffic in stocks was neither "necessary [n]or expedient to accomplish the purpose for which banks are instituted." *Id.* at 345. The "business of banking," the court added, is not whatever "the directors [of the bank] might deem advantageous to the corporation." *Id.* at 343.

A similarly narrow view of bank powers prevailed in *Curtis v. Leavitt*, 15 N.Y. 9 (1857), a case heavily relied upon by petitioners and their amici. *See* Fed. Br. at 17-18; Conference of State Bank Supervisors Br. at 12; New York Clearing House Ass'n Br. at 16-18; American Bankers Ass'n Br. at 11. As in *Talmage v. Pell*, the New York judges asserted that corporations have "such powers as are specifically granted by the act of

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deposits; by buying and selling the gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business. . . .

incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, *and as not having any other*." *Curtis*, 15 N.Y. at 157 (Brown, J.) (emphasis added); *see also id.* at 54 (Comstock, J.) and 209 (Paige, J.).

*Curtis* held that banks had the power to borrow money, but the case did not hold that incidental bank powers should be "broadly interpreted." *Compare* Fed. Br. at 17. Two judges found that the power to borrow is necessary to perform enumerated bank powers. 15 N.Y. at 214-215 (Paige, J.); *Id.* at 158-60 (Brown, J.). Two other judges concluded that the power to borrow is so basic that it is incidental to *every* business. *Id.* at 56 (Comstock, J.); *id.* at 169 (Shankland, J.). Judge Comstock also held that the statute's enumerated powers "cover the whole ground of banking," that is, that the list of specific powers was a complete list of allowable bank activities. *Id.* at 56.[19]

Remarkably, petitioners never mention that portion of *Curtis* dealing with annuities, which specifically stated that the "business of banking" includes neither "insur[ing] property against loss by fire, nor insur[ing] lives, *nor grant[ing] annui-*

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[19] Judge Comstock also noted that the power to borrow money was incidental to the express power to receive deposits. *Id.* at 53. A fifth judge concluded that banks had no such power, and dissented.

Even passages quoted by petitioners — when not taken out of context — support the view that incidental powers must be directly related to an express power. For example, the Comptroller cites Judge Comstock's statement that the statutory enumeration of powers was "not intended to 'restrict the appropriate business of banking.'" Fed. Br. at 18. But the quoted passage continues, in the same sentence, that the statutory specification of express powers was an "eminently useful" legislative definition of "th[e] business [of banking]" that "left nothing to construction or in doubt." *Curtis*, 15 N.Y. at 58. The Comptroller also selectively quotes the statement that "no human sagacity can foresee what implied powers may" prove necessary in the future. Fed. Br. at 18. But the next sentence emphasizes that unless the claimed power is "directly and immediately appropriated to the execution of the specific powers . . . it cannot be recognized as within the scope" of the bank's incidental powers. *Curtis*, 15 N.Y. at 157-58.

*ties.*" 15 N.Y. at 212 (Paige, J.) (emphasis added). In support of this conclusion, *Curtis* cited an earlier New York case, *People v. Utica Ins. Co.*, 15 Johns. 358 (N.Y. Sup. Ct. 1818), which held that an insurance company could not engage in banking operations. Taken together, these cases demonstrate that when Congress enacted Section 24(7), the business of banking was understood to exclude the business of selling annuities and other insurance.[20]

### 2. The "Business of Banking" Is Not a Highly Elastic Term

Within the structure of Section 24(7), the "business of banking" is not so elastic as petitioners wish. Rather, Congress specified the principal elements of the business of banking through the express grants of power in Section 24(7). One thoughtful commentator, who is cited approvingly by the petitioners and their amici, reads *Talmage* and *Curtis* to construe the "business of banking" as "heavily dependent on the customs and usages of banking over many centuries, thereby limiting the business of banking to a coherent and principled group of activities." Symons, *supra*, at 697. Professor Symons concludes that the "business of banking" in Section 24(7) is limited

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[20] Petitioners rely heavily upon a recent decision by the New York Court of Appeals upholding the state banking department's opinion that annuities are not insurance. *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353 (1994). That decision is frankly unfathomable in light of the holding in *Curtis v. Leavitt* and of the existence of a New York statute that specifically defines "annuities" as a "kind[] of insurance." N.Y. Ins. Law § 1113(a) (Consol. 1994). The court decision to allow the Banking Superintendent to overrule a validly-enacted state statute is perhaps best viewed as an example of judicial deference sliding into judicial abdication. *Cf. Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) ("[d]eference does not mean acquiescence"). In any event, the New York court observed that New York "has no statute that is analogous to 12 U.S.C. § 92," so that decision has no relevance to the Section 92 issue in this case. *New York State Ass'n of Life Underwriters*, 83 N.Y.2d at 365 (distinguishing the decision of the Fifth Circuit, below).

to the "historical activities of deposit taking, credit granting, and credit exchange." *Id.* at 692, 680-82. The sale of annuities as agent for insurance companies falls outside that description.

The Comptroller's expansive view of the National Bank Act is remarkable for its arrogation of lawmaking powers and for its reversal of the longstanding congressional policy that national banks have only limited powers. The Comptroller's approach to bank powers would result in the "expansion of the business of banking into every financial activity that a bank considers to be economically attractive." *Id.* at 726. Comptroller Williams sought to avoid that outcome when he advised Congress in 1916 that "it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores." 53 Cong. Rec. 11,001 (1916).

### B. This Court Has Construed Section 24(7) As A Grant of Limited Powers

In construing bank powers under Section 24(7), this Court repeatedly has stated that powers not conferred by Congress are denied. *E.g., Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891). Incidental bank powers exist only as needed to effectuate an express power. As stated in *First Nat'l Bank v. Missouri*, 263 U.S. 640, 659 (1924) (national banks lack incidental authority to establish branches):

> Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

*Texas & Pacific Ry. Co. v. Pottorff*, 291 U.S. 245, 253 (1934) (Brandeis, J.), held that a national bank had no power to pledge its assets to secure private deposits. The Court explained (*id.*) (citations omitted):

> The measure of [a national bank's] powers is the statutory grant; and powers not conferred by Congress are denied. For the Act under which national banks are organized constitutes a complete system for their government[.]

Finding no historical evidence that the practice of pledging assets "ever prevailed among national banks," *Pottorff* rejected the claim that the power to pledge assets was incidental to the express power to "receiv[e] deposits." *Id.* at 254.

The Court reached a similar conclusion with respect to the power to pledge assets to secure the deposits of State funds, rejecting the expansive argument that banks have the "inherent power" to pledge assets to secure deposits of public funds. *Id.* at 264. *Marion v. Sneeden*, 291 U.S. 262, 264, 271-72 (1934) (Brandeis, J.); *accord Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940) (both historical practice and separate statute authorized Secretary of Treasury to exact security for federal monies deposited in national banks).

*California Bank v. Kennedy*, 167 U.S. 362 (1897), also supports a narrow construction of Section 24(7). *Kennedy* held, as did *Talmage v. Pell* for New York state banks, that national banks have no independent power to deal in stocks on their own account. The Court reasoned that "[t]he prohibition is implied from the failure to grant the power." *Id.* at 367. *See also Concord First Nat'l Bank v. Hawkins*, 174 U.S. 364 (1899) (national banks lack power to hold stock for investment).[21]

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[21] *Kennedy* distinguished an earlier case which allowed a national bank to acquire stocks for resale because that bank accepted the stock as a bona fide compromise of a doubtful debt. *First Nat'l Bank v. National Exch. Bank*, 92 U.S. 122, 128 (1876). The power to take appropriate steps to collect a debt was incidental to banks' express credit granting powers, and would not involve the bank "in the ordinary business of buying and selling for profit." *Id.* at 128.

The congressional policy of keeping banking separate from other economic activity is reflected in many rulings construing Section 24(7). This separation keeps bankers focused on banking and also preserves banks as a neutral source of credit by ensuring that banks do not compete with their borrowers. *First Nat'l Bank v. Converse*, 200 U.S. 425 (1906), held that a bank could not engage in a manufacturing enterprise, even though the bank had acquired stock in the company to recover on a debt of the company's corporate predecessor. The Court differentiated between taking stock as collateral for resale and taking stock for the purpose of operating a non-banking business. *Id.* at 439. Consistent with this principle, *Merchants' Nat'l Bank v. Wehrmann*, 202 U.S. 295 (1906), held that a bank could take a partnership interest in a land development business to recover on a bad debt, but only to obtain an accounting of the partnership property and receive a share of any remaining balance. *Id.* at 301-02.

*Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972), reversed the Comptroller's determination that operating a travel agency, a car rental agency, and selling travel insurance are all incidental powers of national banks. The court of appeals held that those services fall outside the "normal traditional range" of banking, but allowed banks to perform such banking functions as selling travellers' checks and foreign currency, making travel loans, and issuing letters of credit. *Id.* at 430, n.6 and 438.[22] *See also Cockrill v. Abeles*, 86 F. 505 (8th Cir. 1898) (national bank could not operate mill acquired in satisfaction of debt); *Cooper v. Hill*, 94 F. 582 (8th Cir. 1899) (national bank could

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[22] *Arnold Tours* also dismissed NationsBank's current argument that "necessary" as used in Section 24(7) must take its meaning from "necessary" as used in the "Necessary and Proper" clause of Article I of the Constitution. NationsBank Br. at 22. As *Arnold Tours* states, different principles of construction apply to constitutional and statutory provisions; constitutional implied powers "are to be generously construed." 472 F.2d at 431 (citing *M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819)).

repair mining property received in payment of debt, but could not operate mine); *Saxon, supra* (national banks may not sell insurance); *National Retailers Corp. v. Valley National Bank*, 604 F.2d 32 (9th Cir. 1979) (national bank cannot provide electronic data processing services); *cf. Independent Ins. Agents v. Department of Banking & Fin.*, 248 Ga. 787, 789 (1982) (under Georgia statute identical to Section 24(7), state bank could not operate insurance agency).

The policy of limiting banks to banking has been a constant in American history. In the wake of massive bank failures during the Great Depression, Congress enacted the Glass-Steagall Act to prohibit commercial banks from engaging in investment banking. Act of June 16, 1933, ch. 89, 48 Stat. 162. In proposing insurance powers for small-town national banks, Comptroller Williams stressed the trivial impact of his proposal. In his letter to Congress, he explained that "in many small places" insurance sales are "not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others." 53 Cong. Rec. 11,001 (1916). Comptroller Williams also noted that this modest new insurance power would not be "likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.*

Petitioners cite a handful of decisions finding particular activities to be incidental to banking. *See, e.g., Merchants' Nat'l Bank v. State Nat'l Bank*, 10 Wall. (77 U.S.) 604 (1870); *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913); *First Nat'l Bank v. Hartford*, 273 U.S. 548 (1927); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). None of these cases challenges the principle that an incidental bank power must be directly related to an express bank power, such as deposit taking, credit granting (*i.e.*, "loaning money") or credit exchanging (*i.e.*, "discounting and negotiating"). *See generally*, Symons, *supra*, at 701-14.

*Merchants Nat'l Bank*, for example, held that the power to certify checks is incidental to the express power to receive deposits. 10 Wall. (77 U.S.) at 649. *Clement Nat'l Bank* found that the power to pay state taxes on depositors' accounts is incidental to the express power to receive deposits coupled with the state's power to collect taxes by garnishment. 231 U.S. at 140. *First Nat'l Bank of Hartford* stated that the power to sell mortgages and evidences of debt is incidental to the express powers to "discount[] and negotiat[e] promissory notes, drafts, bills of exchange, and other evidences of debt," and to loan money on real estate mortgages. 273 U.S. at 559-60 (citing Section 24(7) and law now codified at 12 U.S.C. § 371(a)). *Colorado Nat'l Bank* reasoned that the power to conduct a safe-deposit business is implied by banks' express powers to accept "special deposits" and to invest in safe-deposit corporations. 310 U.S. at 48-50 (citing 12 U.S.C. § 133 and proviso added to 12 U.S.C. § 24(7) in 1927). Finally, *Franklin Nat'l Bank* held that the express power to receive deposits implies the power to "let the public know about it" by advertising. 347 U.S. at 377-78.

Most of the lower court decisions cited by petitioners also tie incidental powers to banks' enumerated powers.[23] *See, e.g.*,

[23] Even the Comptroller usually justifies new incidental powers with relation to banks' enumerated powers. *See, e.g.*, OCC Interpretive Letter No. 283, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447 at 77,609 (Mar. 16, 1984) (sale of credit-related life and disability insurance and involuntary unemployment insurance "is directly related to the bank's express lending authority"); OCC Interpretive Letter No. 326, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,496 at 77,756 (Jan. 17, 1985)(power to broker options incidental to express power to broker securities); OCC Interpretive Letter No. 356, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,526 (Jan. 7, 1986)(power to execute orders for agricultural and metals futures contracts for customers is incidental to "banks' express lending power" provided that activity "is limited to hedging transactions in connection with loans to Bank customers"); OCC Interpretive Letter No. 388, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. ¶ 85,612 at 77,940 (June 16, 1987) (issuance of mortgage-

*M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382-83 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (secured auto loan in form of lease arrangement is incidental to express power to "loan[] money on personal security," but bank could not provide repair services or insurance coverage); *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (sale of mortgage pass-through certificates is incidental to express power to sell mortgage loans). Even *Independent Bankers' Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), which misapplied Section 92 in approving the sale of credit life insurance, attempted to justify that activity under Section 24(7) as directly related to banks' express power to loan money on personal security. *Id.* at 1170. In contrast, the Comptroller makes no claim that the sale of annuities is directly related to any enumerated bank power.

### C. The Sale Of Annuities Is Not Part Of The "Business Of Banking"

The Comptroller contends that the sale of annuities is a part of the "business of banking," which assertedly includes the "power to broker financial investment instruments." NationsBank Pet. App. 38a. This supposed power appears nowhere in Section 24(7), and the Comptroller cites no authority to suggest that such a bank power predated enactment of that statute in 1863. Indeed, the evidence is all to the contrary.

When New York enacted the Free Banking Act of 1838 and when Congress later enacted Section 24(7), they each intended to define the "business of banking" as it was then understood, and to leave "nothing to construction or in doubt." *See Curtis*, *supra*, 15 N.Y. at 58 (Comstock, J.); *Pottorff*, *supra*, 291 U.S. at 253 (statute is full measure of bank powers and

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backed pass-through certificates "represents nothing more than the negotiation of evidences of debt and the sale of real estate loans, which is expressly authorized under 12 U.S.C. §§ 24(Seventh) and 371(a)").

constitutes "complete system"). Nothing in either statute suggests the existence of a power to broker financial investment instruments. Banks could scarcely broker annuities under an amorphous "financial investment instruments" power when it was clearly understood in 1863 that banks could not sell annuities. *Curtis*, 15 N.Y. at 212 (Paige, J.).

The Comptroller insists that the power to broker financial investment instruments derives from banking tradition, NationsBank Pet. App. 38a, but the historical support is very thin, and cannot be stretched to cover annuities. By the beginning of this century, national banks were pressuring the Comptroller for the power to trade in securities, which many state banks could do but national banks did not. *See* Ridgely, *Government Control of Banks and Trust Companies*, 23 Annals 17, 24 (1904) (Comptroller of the Currency).

The Comptroller responded to these complaints in 1902 by quietly authorizing national banks to purchase and sell debt securities. A few national banks established security affiliates, but this practice was denounced as beyond the powers of national banks by the congressional Pujo Committee in 1913, Pujo Report, Money Trust Investigation, 62d Cong., 3d Sess., H. Rep. 1593 (1913) at 151, and by Sen. Carter Glass in 1925. Hearings on the Consolidation of National Banking Associations, Senate Banking and Currency Comm., S. 3316, 68th Cong., 2d Sess. (1925) at 111 ("There is nothing in the national banking act that permits it"); *see generally*, Edwin J. Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 488-95 (1971).

The sale of securities by national banks finally was approved in the McFadden Act of 1927, which authorized national banks to engage in the "business of buying and selling investment securities." 44 Stat. 1226. Following the Crash of 1929, the Glass-Steagall Act of 1933 limited that power to "purchasing and selling . . . securities and stock without recourse, solely upon

the order, and for the account of, customers, and in no case for [the bank's] own account." 12 U.S.C. § 24(7).

These events, decades after enactment of the National Bank Act, do not establish that the "business of banking" in Section 24(7) includes the sale of annuities. First, even the powers granted 60 years later in the McFadden Act did not reach annuities. In addition to being an insurance product, and therefore not a true stock or security, annuities are fundamentally different from the "investment securities" covered by that law. Banks principally have been allowed to broker investment securities to assist customers in transferring assets in forms that are highly liquid. In contrast, both variable and fixed annuities are purchased by individuals for themselves, and the premiums and payouts are uniquely tailored to the mortality expectations for each individual and his or her financial situation. An annuity, once issued, is not negotiable in any marketplace, since most annuities are measured by the remaining life of the annuitant. *See* Symons, *supra*, at 718 (annuities are not part of "business of banking" because they are "long-term, nonmarketable investments, locking up assets rather than providing a pool of liquidity").

Thus, the Comptroller cannot justify the sale of annuities by national banks on the basis of his customary rationale for bank brokerage powers: that "'Banks are regular, active participants in the financial trading markets and normally will have *trading expertise*.'" Fed. Br. at 21 (quoting OCC Interpretive Letter No. 494, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,199 (Dec. 20, 1989)) (emphasis added). Banks have no trading expertise with respect to annuities, both because annuities are not traded in any market and because banks have no expertise at all about annuities, which are an insurance product. Thus, although national banks have been authorized to broker a variety of negotiable securities, options and futures, *see* Fed. Br. at 22 n.8 (listing OCC rulings),

those activities provide no basis for permitting national banks to sell insurance products that are not marketable investment securities.

Moreover, NationsBank proposes to sell annuities that will have a fixed annuity option, and others with combination fixed and variable features. Because both *SEC v. VALIC* and *United Benefit* established that fixed annuities are not securities, *see* p. 32, *supra*, any product including a fixed annuity feature cannot be deemed a security within the bank's brokerage authority.[24]

### D. Section 92's Specific Prohibition Would Prevail Over Any General Power In Section 24(7)

Even if the sale of annuities could be called part of the "business of banking" under Section 24(7), any general authority conferred by that statute could not overcome the specific insurance agency prohibition in Section 92. As the court of appeals reasoned, a "power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary' power." NationsBank Pet. App. 16a (quoting *Saxon*, 399 F.2d at 1014). *First Nat'l Bank v. Missouri* applied the same principle (263 U.S. at 659):

> [I]t is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power.

By granting limited insurance agency authority in Section 92, Congress "negate[d] the existence of any other power to act as

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[24] NationsBank argues that the Glass-Steagall Act expressly authorizes it to sell its annuities. NationsBank Br. at 30-37. As the Comptroller recognized in his Petition, however, "this case does not present that issue." Fed. Pet. at 6-7 n.3. To the contrary, the Comptroller's Approval specifically eschewed any reliance upon the Glass-Steagall Act (NationsBank Pet. App. 37a-38a), and that statute was not mentioned by the district court or the court of appeals in their respective opinions. Indeed, NationsBank's Glass-Steagall Act theory is not even fairly included in its own "Questions Presented." *See* Sup. Ct. R. 14.1(a). The prohibition of Section 92 would override any authority under NationsBank's Glass-Steagall Act theory, in any event.

an insurance agent under the general provisions of Section 24(7)." *Saxon*, 399 F.2d at 1014. That specific prohibition prevails over any general banking authority conferred by Section 24(7). *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one"); *Busic v. United States*, 446 U.S. 398, 406 (1980) ("a more specific statute will be given precedence over a more general one, regardless of their temporal sequence").

## CONCLUSION

The power to establish national banks, and to decide what powers those banks will have, belongs to Congress, which has not given them the power to sell annuities. With due regard to *Chevron*, Comptroller Williams explained long ago that "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." 53 Cong. Rec. 11,001 (1916). As the court of appeals aptly concluded its opinion below, (NationsBank Pet. App. 17a):

> [If] banks seek[] more power than they are currently granted under §§ 92 and 24(7) . . . [they] should look to Congress, not the Comptroller . . . or the courts.

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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## CURRENT STATE STATUTES DEFINING INSURANCE AND ANNUITIES

| State | (1) Annuity= Insurance | (2) Annuity= A Kind Of Insurance | (3) Annuity=Life Insurance | (4) Insurance= Contingent Payment |
|---|---|---|---|---|
| Alabama | | X | | X |
| Alaska | | X | | X |
| Arizona | | X | | X |
| Arkansas | X | | | |
| California | | | X | |
| Colorado | X | | | X |
| Connecticut | | | | X |
| Delaware | X | X | | X |
| Florida | | | X | X |
| Georgia | | | | X |
| Hawaii | | | X | X |
| Idaho | | | | X |
| Illinois | | | X | |
| Indiana | | | X | |
| Iowa | X | | | |
| Kansas | X | X | | |
| Kentucky | X | X | | X |
| Louisiana | | | X | X |
| Maine | X | X | | X |
| Maryland | | X | | X |
| Michigan | | | X | |
| Minnesota | | X | | |
| Montana | | | | X |
| Nebraska | | X | | |
| Nevada | | X | | |
| New Hampshire | | X | | |
| New Jersey | X | X | | |
| New Mexico | | | X | X |
| New York | | X | | |
| North Carolina | | | X | |
| North Dakota | X | | | |
| Ohio | X | | | |
| Oklahoma | | | X | X |

| State | (1) Annuity= Insurance | (2) Annuity= A Kind Of Insurance | (3) Annuity=Life Insurance | (4) Insurance= Contingent Payment |
|---|---|---|---|---|
| Oregon | X | X | | X |
| Pennsylvania | X | | | |
| Rhode Island | | X | | |
| South Carolina | X | | | X |
| South Dakota | | X | | X |
| Tennessee | | | X | |
| Utah | X | | | |
| Vermont | X | X | | |
| Virginia | | X | | |
| Washington | | | X | X |
| West Virginia | | | X | X |
| Wisconsin | | | X | |
| Wyoming | | X | | X |
| **TOTALS:** | **15** | **20** | **14** | **23** |

**NOTES**

(1) State statutes in this category specifically define "insurance," "insurance contract" or insurance "policy" to include annuities. A number of states do not define "insurance" per se.

(2) State statutes in this category specifically list annuities as a "class," "kind," "type" or "line" of insurance. Many states' statutes do not specifically enumerate the various kinds of insurance.

(3) State statutes in this category specifically define life insurance to include annuities. In order to minimize double counting, no entry is made under this category if a state falls in category (1) or (2).

(4) State statutes in this category define insurance to include the "pay[ment of] a specified amount or benefit upon determinable contingencies" or words of similar import.

**SOURCES**

Ala. Code §§ 27-1-2, 27-5-3 (1994)

Alaska Stat. §§ 21.12.055, 21.90.900 (22) (1993)

Ariz. Rev. Stat. Ann. §§ 20-103, 20-254.01 (1993)

Ark. Code Ann. § 23-60-102 (1) (1993)

Cal. Ins. Code § 101 (West 1994)

Colo. Rev. Stat. 10-1-102 (7) (1994)

Conn. Gen. Stat. § 38a-1 (10) (1993)

Del. Code Ann. tit. 18, §§ 102, 1715, 2302 (1993)

Fla. Stat. Ann. §§ 624.02, 624.602 (West 1993)

Ga. Code Ann. § 33-1-2 (2) (1994)

Haw. Rev. Stat. §§ 431:1-201, 431:1-204 (1994)

Idaho Code § 41-102 (1994)

Ill. Ann. Stat. ch. 215, para. 5, § 4 (Smith-Hurd 1993)

Ind. Code Ann. § 27-1-5-1 (Burns 1994)

Iowa Code Ann. § 507B.2 (West 1994)

Kan. Stat. Ann. §§ 40-247, 40-601 (1993)

Ky. Rev. Stat. Ann. §§ 304.1-030, 304.5-030 (1987)

La. Rev. Stat. Ann. §§ 22:5 (1), 22:6 (1) (West 1994)

Me. Rev. Stat. Ann. tit. 24-A, §§ 3, 703 (West 1993)

Md. Ann. Code art. 48A, §§ 2, 65 (1993)

Mich. Comp. Laws Ann. § 500.602 (West 1994)

Minn. Stat. Ann. § 60A.06 (1) (West 1994)

Mont. Code Ann. § 33-1-201 (5) (1993)

Neb. Rev. Stat. § 44-201 (1993)

Nev. Rev. Stat. Ann. § 120A.090 (Michie 1994)

N.H. Rev. Stat. Ann. § 401:1 (1993)

N.J. Stat. Ann. §§ 17:17-1(c), 17:22A-2 (e) (1994)

N.M. Stat. Ann. §§ 59A-1-5, 59A-7-2 (Michie 1992)

N.Y. Ins. Law § 1113 (a) (Consol. 1994)

N.C. Gen. Stat. § 58-58-1 (1991)

N.D. Cent. Code § 26.1-26-02 (1) (1993)

Ohio Rev. Code Ann. § 3902.02 (A) (Baldwin 1993)

Okla. Stat. Ann. tit. 36, §§ 102, 702 (West 1994)

Or. Rev. Stat. §§ 731.102, 731.154 (1993)

Pa. Stat. tit. 40, § 1171.3 (1994)

R.I. Gen. Laws § 27-3.2-2 (1993)

S.C. Code Ann. § 38-1-20 (19) (Law. Co-op. 1976)

S.D. Codified Laws Ann. §§ 58-1-2 (10), 58-6-20 (1994)

Tenn. Code Ann. § 56-2-201(4) (1989)

Utah Code Ann. § 31a-1-301 (1994)

Vt. Stat. Ann. tit. 8, §§ 4722, 4793 (1993)

Va. Code Ann. §§ 38.2-106, 38.2-107 (Michie 1994)

Wash. Rev. Code Ann. §§ 48.01.040, 48.11.020 (West 1994)

W. Va Code §§ 33-1-1, 33-1-10 (1994)

Wis. Stat. § 71.42 (3) (1993)

Wyo. Stat. §§ 26-1-102 (a) (xv), 26-5-119 (1994)

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# EARLY STATE STATUTES DEFINING THE BUSINESS OF INSURANCE TO INCLUDE THE GRANTING, SELLING AND DISPOSING OF ANNUITIES

| **State** | **Statute** |
|---|---|
| Arizona | Ariz. Rev. Stat. § 3423 (1913) |
| Arkansas | 1913 Ark. Acts 220 |
| California | 1915 Cal. Stat. 1534 ch. 768, § 1 |
| Colorado | 1913 Colo. Sess. Laws ch. 99, § 29 |
| Connecticut | 1883 Conn. Pub. Acts ch. 90, § 1 |
| Florida | 1851 Fla. Laws ch. 313, § 1 |
| Idaho | 1901 Idaho Sess. Laws 169 ch. 2, § 6 |
| Illinois | 1911 Ill. Laws 377, § 1 |
| Indiana | 1899 Ind. Acts ch. 28, § 1 |
| Iowa | 1900 Iowa Acts ch. 65, § 2 |
| Kansas | 1907 Kan. Sess. Laws ch. 227, § 1 |
| Kentucky | 1893 Ky. Acts ch. 171, § 106 |
| Louisiana | 1908 La. Acts. 203, § 1 |
| Maine | 1899 Me. Acts ch. 55 |
| Maryland | 1868 Md. Laws ch. 471, § 99 |
| Massachusetts | 1907 Mass. Acts. ch. 576, § 66 |
| Michigan | 1869 Mich. Pub. Acts 77, § 1 |
| Minnesota | 1895 Minn. Laws ch. 175, § 27 |
| Mississippi | 1904 Miss. Laws ch. 79, § 3 |
| Missouri | 1869 Mo. Laws 27, § 1 |
| Nebraska | 1913 Neb. Laws ch. 154, § 78 |
| Nevada | 1891 Nev. Stat. ch. 98, § 9 |
| New Jersey | 1914 N.J. Laws ch. 88 |
| New Mexico | 1909 N.M. Laws ch. 48, § 25 |
| New York | 1853 N.Y. Laws ch. 463, § 1 |

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|---|---|
| North Carolina | 1899 N.C. Sess. Laws ch. 54, § 55 |
| North Dakota | 1891 N.D. Laws ch. 73, § 1 |
| Ohio | 1872 Ohio Laws 150 |
| Oklahoma | 1909 Okla. Sess. Laws ch. 21, § 3 |
| Pennsylvania | 1911 Pa. Laws 581 § 1 |
| South Carolina | 1910 S.C. Acts 420, § 10 |
| Tennessee | 1875 Tenn. Pub. Acts ch. 142, § 10 |
| Texas | 1909 Tex. Gen. Laws ch. 108, § 1 |
| Vermont | 1915 Vt. Pub. Acts 158, § 1 |
| Washington | 1913 Wash. Sess. Laws ch. 109, § 2 |
| West Virginia | 1907 W. Va. Acts ch. 77, § 17 |
| Wisconsin | 1850 Wis. Laws ch. 232, § 1 |
| Wyoming | 1911 Wyo. Sess. Laws ch. 50 |